

AMENDED IN SENATE JUNE 18, 2012

AMENDED IN ASSEMBLY APRIL 30, 2012

AMENDED IN ASSEMBLY MARCH 29, 2012

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 2063

Introduced by Assembly Member Alejo

February 23, 2012

An act to add Section 13294 to the Water Code, relating to water quality.

LEGISLATIVE COUNSEL'S DIGEST

AB 2063, as amended, Alejo. Ex parte communications.

Under existing law, the Porter-Cologne Water Quality Control Act, the State Water Resources Control Board and the 9 California regional water quality control boards are the principal state agencies with responsibility for the coordination and control of water quality in the state. The act requires the state board to formulate and adopt state policies for water quality control, and authorizes the state board to hold any hearings and conduct any investigations in any part of the state necessary to carry out the powers vested in the state board, as specified. The act also requires the regional boards to adopt regional water quality control plans in compliance with the state policies. Existing law requires each regional board to conduct certain proceedings, including, but not limited to, holding at least 6 regular meetings each calendar year.

Existing law, the Administrative Procedure Act, provides for the conduct of administrative adjudication proceedings of state agencies. Existing law generally prohibits ex parte communication including communication during a pending proceeding, regarding any issue in

the proceeding, to the presiding officer by an employee or representative of an agency that is a party to the proceeding without notice and opportunity for all parties to participate, except as specified.

This bill would prohibit a state board member, a regional board member, or any interested person, *as defined*, from engaging in a communication that would be considered ex parte under the Administrative Procedure Act. The bill would provide that a communication is not ex parte if the communication is between a state or regional board staff member acting in his or her official capacity and ~~any of the following: a state board member, regional board member, or any interested person. The bill would also provide that a communication is not ex parte if the communication is limited entirely to procedure or practice, as specified.~~ The bill would provide that an otherwise prohibited ex parte communication is permissible if the state or regional board member fully discloses the communication, and the communication is in regard to waste discharge requirements, water quality certifications, or conditional waivers of waste discharge requirements, as specified. The bill would also provide that an otherwise prohibited ex parte communication is permissible if a regional board member fully discloses the communication, and the communication is in regard to a municipal separate storm sewer permit, as defined.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 13294 is added to the Water Code, to
2 read:
3 13294. (a) *For the purposes of this section, the following terms*
4 *have the following meanings:*
5 (1) *“Interested person” means any of the following:*
6 (A) *A participant in the proceeding regarding a matter before*
7 *a board, or an agent, employee, or a person receiving*
8 *consideration for representing that participant.*
9 (B) *A person with a financial interest, as described in Article 1*
10 *(commencing with Section 87100) of Chapter 7 of Title 9 of the*
11 *Government Code, in a matter before a board, or an agent or*
12 *employee of the person with a financial interest, or a person*
13 *receiving consideration for representing the person with a financial*
14 *interest.*

1 (C) A representative acting on behalf of a civic, environmental,
2 neighborhood, business, labor, trade, or similar organization who
3 intends to influence the decision of a board member on a matter
4 before the board.

5 (2) “Ex parte communication” is an oral or written
6 communication between a member of a board and an interested
7 person, about a matter within the board’s jurisdiction, which does
8 not occur in a public hearing, workshop, or other official
9 proceeding, or on the official record of the proceeding on the
10 matter.

11 (b) A board member, or any interested person, shall not engage
12 in an ex parte communication that would be subject to the ex parte
13 communication provisions of the Administrative Procedure Act
14 (Article 7 (commencing with Section 11430.10) of Chapter 4.5 of
15 Part 1 of Division 3 of Title 2 of the Government Code), except
16 as provided by this section. ~~The following communications are~~
17 ~~not ex parte communications:~~ *The following communications shall*
18 *not constitute ex parte communications:*

19 (1) A communication between a regional or state board staff
20 member acting in his or her official capacity as an advisor to a
21 state board or regional board, and a member of that board.

22 (2) A regional or state board staff member acting in his or her
23 official capacity and any interested person.

24 ~~(1) A communication between a regional or state board staff~~
25 ~~member acting in his or her official capacity and any of the~~
26 ~~following: a state board member, a regional board member, or any~~
27 ~~interested person.~~

28 ~~(2) A communication limited entirely to a procedure or practice,~~
29 ~~that is not in controversy, including a request for a continuance.~~

30 ~~(b)~~

31 (c) An ex parte communication that would otherwise be
32 prohibited shall be allowed if paragraphs (1) and (2) apply:

33 (1) The subject and content of the ex parte communication is
34 initiated by an interested party and is directed to either of the
35 following:

36 (A) A state board member or a regional board member regarding
37 the adoption, modification, or rescission of one or more of the
38 following: waste discharge requirements pursuant to Section 13263
39 or 13377, the conditions of water quality certification pursuant to
40 Section 13160, or conditional waiver of waste discharge

1 requirements pursuant to Section 13269, where, in any case, the
2 state board or regional board action does not identify specific
3 persons as dischargers, but instead allows persons to enroll or file
4 an authorization to discharge under the action.

5 (B) A regional board member regarding a municipal separate
6 storm sewer permit under Section 402(p)(3) of the federal Clean
7 Water Act (33 U.S.C. Sec. 1344 et seq.).

8 (2) The state or regional board member fully discloses and
9 makes public the ex parte communication by providing a full report
10 of the communication to the board on the record of the proceeding
11 ~~at the first hearing that occurs after ex parte~~ *within seven days after*
12 ~~the communication occurs, or, if the communication occurs within~~
13 *seven days of the next board hearing, to the board on the record*
14 *of the proceeding at that hearing.*

15 (e)

16 (d) (1) ~~The state board~~ *Office of Administrative Law* shall adopt,
17 and provide to the regional board for adoption, standard disclosure
18 forms for reporting ex parte communications which shall include,
19 but not be limited to, all of the following information:

20 (A) The date, time, and location of the communication, *and*
21 *whether it was oral, written, or both.*

22 (B) ~~The identity~~ *identities of each board member involved, the*
23 ~~person or persons~~ *initiating the communication, and the person or*
24 ~~persons receiving, any persons present during the communication.~~

25 (C) A complete description of the content of the communication,
26 including:

27 (i) If the communication is written, the writing and any written
28 response to the communication.

29 (ii) If the communication is oral, a memorandum stating the
30 substance of the communication, any response made, and the
31 identity of each person from whom the board member received
32 the communication.

33 (iii) *A copy of any written, audiovisual, or other material used*
34 *for or during the communication, which shall be attached to this*
35 *description.*

36 (2) The state or regional board shall place in the public record
37 any report of an ex parte communication involving a member of
38 that board.

39 (d)

1 (e) The presiding officer shall notify the parties to the proceeding
2 and all other parties subscribed to the notification list kept by the
3 state or regional board *by electronic mail in a timely manner* that
4 a communication described in this section has been made a part
5 of the record.

6 (e)

7 (f) If a party requests an opportunity to address the
8 communication within 10 days after the receipt of notice of the
9 communication, *the party shall be allowed to comment on the*
10 *communication.*

11 ~~(1) The party shall be allowed to comment on the~~
12 ~~communication.~~

13 ~~(2) The state or regional board has discretion to allow the party~~
14 ~~to present evidence concerning the subject of the communication;~~
15 ~~including discretion to reopen the hearing that has been concluded.~~

16 (f)

17 (g) Notwithstanding Section 11425.10 of the Government Code,
18 the ex parte communications provisions of the Administrative
19 Procedure Act (Article 7 (commencing with Section 11430.10) of
20 Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government
21 Code) do not apply to a communication that meets the requirements
22 of this section.